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Missouri Public Service Commission

Missouri Public Service Commission

(Date File Stamp)

Judge or Division:	Appellate Number:	
Appellant: The Office of the Public Counsel	Missouri Public Service Commission File Number: WO-2015-0211	
vs.		
Respondent: The Missouri Public Service Commission		

Notice of Appeal

Notice is given that The Office of the Public Counsel appeals to the Missouri Court of Appeals Western Eastern Southern District.

7-7-15

Date Notice of Appeal
(to be filled in by Secretary of Commission)

Christina Baker

Filed Signature of Attorney or Appellant

The notice of appeal shall include the appellant's application for rehearing, a copy of the reconciliation required by subsection 4 of section 386.420, a concise statement of the issues being appealed, a full and complete list of the parties to the commission proceeding, and any other information specified by the rules of the court. The appellant(s) must file the original and (2) two copies and pay the docket fee required by court rule to the Secretary of the Commission within the time specified by law. Please make checks or money orders payable to the Missouri Court of Appeals. At the same time, Appellant must serve a copy of the Notice of Appeal on attorneys of record of all parties other than appellant(s), and on all parties not represented by an attorney.

CASE INFORMATION

Appellant Attorney / Bar Number: Dustin Allison #54013 & Christina Baker #58303		Respondent's Attorney / Bar Number: Shelley Brueggemann #52173	
Address: 200 Madison Street, Suite 650 PO Box 2230 Jefferson City, MO 65102		Address: 200 Madison Street, Suite 800 PO Box 360 Jefferson City, MO 65102	
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Date of Commission Decision: 06/17/2015	Date of Application for Rehearing Filed: 06/26/2015	Date Application for Rehearing Ruled On: 07/07/2015	

DIRECTIONS TO COMMISSION

A copy of the notice of appeal and the docket fee shall be mailed to the clerk of the appellate court. Unless otherwise ordered by the court of appeals, the commission shall, within thirty days of the filing of the notice of appeal, certify its record in the case to the court of appeals.

Certificate of Service

I certify that on 07/07/2015 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.

Missouri Public Service Commission – Hand delivered
Cydney D. Mayfield, MBN 57569
P.O. Box 360
Jefferson City, MO 6510

Missouri-American Water Company – U.S. Mail Service
Timothy W. Luft, MBN 40506
727 Craig Road
St. Louis, MO 63141



Appellant or Attorney for Appellant

FORM 1. CIVIL CASE INFORMATION FORM SUPPLEMENT

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD _____

The Office of the Public Counsel,

Petitioner/Appellant

Dustin Allison, MBN 54013
Christina Baker, MBN 58303
P.O. Box 2230
Jefferson City, MO 65102

vs.

Missouri Public Service Commission

Defendant/Respondent

Shelly Brueggemann, MBN 52173
P.O. Box 360
Jefferson City, MO 65102

Date Notice filed with the Public Service Commission July 7, 2015

The Record on Appeal will consist of a Legal File Only. (This will include records filed pursuant to Rules 81.13 and 81.16)

FACTUAL BACKGROUND: (Events Giving Rise to Cause of Action)

Judicial Review of the Missouri Public Service Commission's June 17, 2015 *Report and Order* issued in Case Number WO-2015-0211, In the Matter of the Petition of Missouri-American Water Company for Approval to Change its Infrastructure System Replacement Surcharge (ISRS).

ISSUE(S): (Anticipated to be Presented by the Appeal; Appellant is Not Bound by this Designation)

OPC challenges the lawfulness and reasonableness of the Public Service Commission's findings and conclusions issued in its June 17, 2015 *Report and Order* issued in Case Number WO-2015-0211.

LIST OF PARTIES TO THE COMMISSION PROCEEDING

(As required by § 386.510 RSMo)

The following parties participated in Public Service Commission Case Number WO-2015-0211:

<p>Missouri-American Water Company:</p> <p>Timothy W. Luft, MBN 40506 727 Craig Road St. Louis, MO 63141 (314) 996-2279 (314) 997-2451 (Fax) Timothy.Luft@amwater.com</p> <p>Attorney for Missouri-American Water Company</p>	<p>Office of the Public Counsel:</p> <p>Dustin J. Allison, MBN 54013 Acting Public Counsel P O Box 2230 Jefferson City, MO 65102 (573) 751-4857 (573) 751-5562 (Fax) Dustin.Allison@ded.mo.gov</p> <p>Attorney for the Office of the Public Counsel</p>
<p>Public Service Commission Staff:</p> <p>Cydney D. Mayfield, MBN 57569 Senior Counsel P.O. Box 360 Jefferson City, MO 65102 573-751-4227 573-526-6969 (Fax) cydney.mayfield@psc.mo.gov</p> <p>Attorney for the Staff of the Missouri Public Service Commission.</p>	

STATEMENT OF THE ISSUES

(As required by § 386.510 RSMo)

Appellant Public Counsel will raise the following issues on appeal:

1. OPC challenges the lawfulness and reasonableness of the Public Service Commission's findings and conclusions issued in its June 17, 2015 *Report and Order* issued in Case Number WO-2015-0211 approving the proposed tariff intended to increase the Infrastructure System Replacement Surcharge (ISRS) for the St. Louis County customers of Missouri-American Water Company.

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the matter of the Petition of Missouri-)
American Water Company for Approval) File No. WO-2015-0211
to Change its Infrastructure System)
Replacement Surcharge (ISRS).)

THE OFFICE OF THE PUBLIC COUNSEL'S APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel (Public Counsel), pursuant to § 386.500 and 4 CSR 240-2.160, and hereby requests that the Commission rehear this case because the Commission's findings and conclusions are unlawful and unreasonable. The order is unlawful in that statutory authority for the order does not exist. The order is unreasonable in that it is unsupported by substantial and competent evidence considering the whole record and constitutes an abuse of the Commission's discretion.¹

St. Louis County's Population Is Less Than One Million Inhabitants

Section 393.1003.1 states that a "water corporation providing water service in a county with a charter form of government and with more than one million inhabitants may file a petition and proposed rate schedules with the commission to establish or change ISRS rate schedules...."² This sentence establishes several jurisdictional pre-requisites that must be met in

¹ *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 2015 Mo. Lexis 98, Slip Op. at 5 (June 16, 2015); *Report and Order*, Case No. WO-2015-0211 (Doc. No. 35).

² Mo. Rev. Stat. § 393.1003.1 (Sup. 2014); *see also* § 393.1003.2 (reiterating that the population requirement is jurisdictional by stating that "the Commission shall not approve an ISRS" where each of the following elements has not been met: 1) a water corporation; 2) in a county with a charter form of government; 3) with more than one million inhabitants, and 4) a general rate proceeding before the Commission in the past three years.

order for the Commission to consider an ISRS application. The applicant must be 1) a water corporation, 2) providing service in a charter county, and 3) which has more than one million inhabitants. Non-water corporations cannot file an ISRS application. Water corporations providing service only in non-charter counties cannot file an ISRS application. Water corporations which provide service in charter counties with populations of one million or less cannot file an ISRS application. And unless these jurisdictional pre-requisites are met by the applicant, the Commission has no authority to consider such an application, as the Commission is a creature of statute and has only that authority which is expressly conferred upon it by the legislature.³

Here, there is no dispute that the applicant is a water corporation providing service in a charter county, and thus meets those two elements of § 393.1003.1's requirements. However, the applicant is not providing service in a charter county with one million or more inhabitants. As of the most recent decennial census, no such county exists in Missouri.⁴ Section 1.100.1 requires the Commission to use the 2010 decennial census to determine population in this instance.⁵ And while § 1.100.2 has a savings provision for St. Louis City if its population were to drop between decennial censuses, no such savings provision exists for any other county which experiences a drop in population.⁶

³ *Sharp v. Kansas City Power & Light*, 457 S.W.3d 823, *13 (Mo. App. W.D. 2015).

⁴ See 2010 Decennial Census Summary File 998954 Table P1, Public Law 94-171 (indicating population for St. Louis County – Missouri's most-populous charter county – to be 998,954 inhabitants as of April 1, 2010).

⁵ See *Union Elec. Co. v. Cuivre River Elec. Coop.*, 571 S.W.2d 790, 796 (Mo. App. St. Louis 1978) (holding the term "other matters" as used in the § 1.100 is not restricted to those matters specifically enumerated thereafter in the law).

⁶ See Mo. Rev. Stat. § 1.100.2 (Supp. 2014).

The Commission's Report and Order states expressly that it grants Missouri-American's request for relief in this case.⁷ However, Missouri-American Water's request for relief in this case exceeds the scope of the Commission's authority and must be denied. Indeed, it may be that the Commission is required to go further and to reject all of Missouri-American Water's existing ISRS tariffs due to the population change in St. Louis County. In granting Missouri-American's request for relief, despite the fact that St. Louis County no longer satisfies the population-based, and statutorily mandated, condition precedent to an ISRS, the Commission risks making permanent an order which is unlawful. The Commission should reconsider and rehear this matter in order to correct this error.

The Order Is Inconsistent with the Language and Intent of the ISRS Statute

Central to the Commission's incorrect order is its interpretation of the following pertinent language from § 393.1003.1:

a water corporation...may file a petition ...with the commission to establish or change ISRS rate schedules that will allow for the adjustment of the water corporation's rates and charges to provide for the recovery of costs for eligible infrastructure system replacements made in such county with a charter form of government and with more than one million inhabitants; provided that an ISRS, on an annualized basis, must produce ISRS revenues of at least one million dollars but not in excess of ten percent of the water corporation's base revenue level approved by the commission in the water corporation's most recent general rate proceeding.⁸

In entering its order, the Commission ignores both the plain language of the statute and the legislature's intent in passing it.

⁷ *Report and Order*, pg. 13, EFIS Item No. 35.

⁸ Mo. Rev. Stat. § 393.1003.1 (Supp. 2014).

“The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language.”⁹ The Commission, when it engages in statutory interpretation, must presume that all words in the statute have meaning and that none are superfluous.¹⁰ Here, § 393.1003.1 does not “guarantee” recovery of eligible projects between general rate cases in any way. Rather, § 393.1003.1 permits the water corporation to file tariff schedules which “provide for” the recovery of eligible costs. This is plain and unambiguous language. “To guarantee” and “to provide for” are not synonymous.

The utility in this case prevailed upon the Commission to ignore this language – language which is entirely consistent with long-standing ratemaking principles that a specific level of revenue requirement is not guaranteed – and instead to focus on language later in the statute which the utility purports creates an entitlement that revenue will be “produced” after the revenue has been applied for and authorized. However, that language must be read in reference to the language around it and in the remaining ISRS subsections and viewed consistent with the purpose of the Commission to protect the public in order to understand the intent of the legislature and its import.¹¹ A proper analysis of such language, guided by correct application of the canons of construction, does not lead to the result the Commission reached.

⁹ *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. 2013).

¹⁰ *Wehrenberg, Inc. v. Dir. of Revenue*, 352 S.W.3d 366, 367 (Mo. 2011).

¹¹ *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-5 (1993) (stating statutory interpretation is “guided ‘not by a single sentence or member of a sentence, but looking to the provisions of the whole law....’” (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)); *Eli Lilly & Co v. Medtronic, Inc.*, 496 U.S. 661-668-69 (1990) (stating statutory interpretation is informed by and should not do violence to the structure of the statutory scheme); *State ex rel. Crown Coach v. Pub. Svc. Comm’n*, 179 S.W.2d 123, 126 (Mo. App. K.C. 1944) (offering the dominant policy rationale for the Commission is the protection of the public).

To the extent the language in the statute is ambiguous, the analysis undertaken by the Commission in its Order as justification for the result it reached, when contrasted with an interpretation of the text consistent with the intent of the legislature in creating the ISRS and the requirement that exceptions to traditional ratemaking must be construed narrowly in favor of the public, demonstrates the error in the Commission's decision.¹² Instead of seeing the carry-forward provision of the ISRS statute for what it plainly is and what the legislature manifestly intended it to be – a means to assist in providing for, but not guaranteeing, revenue requirement – the Commission's Order transforms the carry-forward language and uses it as justification for the establishment, in effect, of multiple ISRS's. The result is a distortion of the statute, an authorization to stack ISRS's, and a guarantee of revenue requirement recovery. None of this is permitted by law. The logic required to reach the Commission's result is untenable, contorts the statute unlawfully and leads to unreasonable results. The Commission should reconsider and rehear its order in this regard.

Conclusion

Public Counsel's Application for Rehearing should be granted because the Report and Order of June 17, 2015, is unlawful and unreasonable and leads to unjust and unreasonable rates in violation of § 393.130.¹³

¹²*Florida Realty, Inc. v. Kirkpatrick*, 509 S.W.2d 114, 121 (Mo. 1974) (holding that statutory exceptions are construed narrowly); *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (quoting *Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) stating "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people").

¹³Mo. Rev. Stat. § 393.130 (2000 & Supp.); *see also* § 393.1003.1 (indicating that the ISRS may be utilized "*notwithstanding* any provisions of...this chapter to the contrary...").

WHEREFORE, Public Counsel respectfully requests that the Commission grant its application for rehearing and issue an order rejecting MAWC's proposed tariff revisions.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Dustin J. Allison

By: _____

Dustin J. Allison
Mo. Bar Enrollment No. 54013

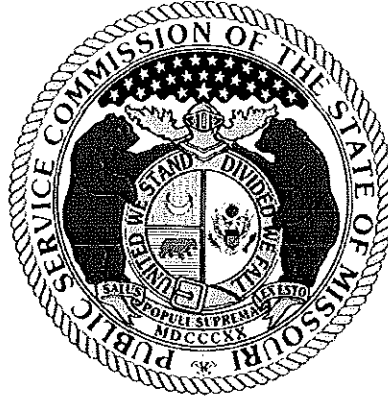
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the parties of record this 26th day of June 2015:

/s/ Dustin J. Allison

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the matter of the Petition of)
Missouri-American Water Company for)
Approval to Change its Infrastructure)
System Replacement Surcharge (ISRS))

File No. WO-2015-0211
Tracking No. YW-2015-0267

REPORT AND ORDER

Issue Date: June 17, 2015

Effective Date: June 27, 2015

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the matter of the Petition of)
Missouri-American Water Company for) File No. WO-2015-0211
Approval to Change its Infrastructure) Tracking No. YW-2015-0267
System Replacement Surcharge (ISRS))

REPORT AND ORDER

Issue Date June 17, 2015

Effective Date June 27, 2015

The Missouri Public Service Commission is granting the petition and approving the tariff.¹ The tariff proposes to increase the Infrastructure System Replacement Surcharge for St. Louis County customers of Missouri-American Water Company by 0.7 percent.

Procedural History

Missouri-American Water Company ("MAWC") filed the petition and tariff.² Staff filed its recommendation to deny the petition and reject the tariff.³ MAWC filed a reply to the recommendation.⁴ The Commission issued notice of a contested case.⁵ MAWC and Staff filed a list of issues.⁶ The Commission received position statements from MAWC,⁷

¹ As used in Commission practice, a tariff is a schedule governing rates, charges, and other terms of public utility service. The term may refer to such document as approved by the Commission or as proposed by the utility. It may also refer to all such documents, or the subset addressing one subject matter, or a single page.

² EFIS No. 1 (February 27, 2015) *MAWC's Petition to Change its Infrastructure Replacement Surcharge*.

³ EFIS No. 7 (April 28, 2015) *Staff Recommendation to Reject Tariff and Proposed Increase to the Infrastructure Replacement Surcharge*.

⁴ EFIS No. 8 (May 4, 2015) *Response and Objection to Staff Recommendation, Request for Regulatory Asset, and Motion to Establish Procedural Schedule*.

⁵ EFIS No. 14 (May 7, 2015) *Notice of Contested Case*.

⁶ EFIS No. 21 (May 22, 2015) *List of Issues, List and Order of Witnesses, Order of Opening and Order of Cross-Examination*.

Staff,⁸ and OPC.⁹ The Commission convened an evidentiary hearing on the petition and tariff.¹⁰ The parties filed post-hearing briefs.¹¹

ISRS

The petition and tariff seek an increase in MAWC's Infrastructure System Replacement Surcharge ("ISRS"). The ISRS produces revenue in addition to compensation set in a general rate action.¹² In Commission practice, a general rate action typically compensates MAWC only for expenses based on an historical test year, occurs only every few years, and takes eleven months to decide. The ISRS recovers eligible costs between general rate actions, so it constitutes an incentive for MAWC to pursue infrastructure projects. An ISRS lasts no more than three years ("ISRS cycle") with some flexibility for a general rate action to address infrastructure system replacement costs.¹³

The statutes prescribe the mechanics and limitations of the ISRS. Those provisions:

- Describe the projects and the expenses eligible for compensation through the ISRS ("eligible costs"),¹⁴

⁷ EFIS No. 24 (May 26, 2015) *MAWC's Statement of Position*.

⁸ EFIS No. 23 (May 26, 2015) *Staff Statements of Position*.

⁹ EFIS No. 22 (May 26, 2015) *The Office of the Public Counsel's Position Statement*.

¹⁰ EFIS No. 25 (June 5, 2015) *Transcript-Volume 1*.

¹¹ EFIS No. 32 (June 12, 2015) *Staff's Post-Hearing Brief*; EFIS No. 33 (June 12, 2015) *MAWC's Brief*; EFIS No. 34 (June 12, 2015) *The Office of the Public Counsel's Statement in Support of Staff*.

¹² Section 393.1006.7, RSMo Supp. 2013.

¹³ Section 393.1003.2 and .3, RSMo Supp. 2013.

¹⁴ Section 393.1006(4), RSMo Supp. 2013.

- Require MAWC to bill customers who benefit from the projects per gallon of water (“billing determinants”),¹⁵ and
- Cap the revenue that the ISRS produces (“maximum revenue”).¹⁶

The maximum revenue is ten percent of MAWC’s base level revenue as determined in MAWC’s most recent general rate action.¹⁷

To keep the ISRS on target, the statutes provide that MAWC may file a new ISRS tariff every six months,¹⁸ and that MAWC’s ISRS revenue is subject to a reconciliation every twelve months¹⁹ (“reconciliation period”). The reconciliation determines whether any over-production or under-production (“reconciliation amount”) has occurred and adjusts the next ISRS tariff by the reconciliation amount.²⁰ If the reconciliation amount is an over-recovery, the amount projected for the upcoming reconciliation period is decreased by the reconciliation amount.²¹ If the reconciliation amount is an under-recovery, the amount projected for the upcoming reconciliation period is increased by the reconciliation amount.²² No over-recovery is at issue in this action, but under-recoveries are at issue.

¹⁵ Section 393.1006.5, RSMo Supp. 2013

¹⁶ Section 393.1003.1, RSMo Supp. 2013; 4 CSR 240-3.650.

¹⁷ Section 393.1003(1), RSMo Supp. 2013.

¹⁸ Section 393.1006.3, RSMo Supp. 2013.

¹⁹ Section 393.1006.5(2), RSMo Supp. 2013.

²⁰ Section 393.1006.5(2), RSMo Supp. 2013.

²¹ Section 393.1006.5(2), RSMo Supp. 2013.

²² Section 393.1006.5(2), RSMo Supp. 2013.

Standards of Proof

MAWC has the burden of proving the allegations in its petition²³ and the propriety of the tariff.²⁴ The quantum of evidence by which MAWC must carry its burden is the preponderance of the evidence.²⁵ The preponderance means the evidence that weighs more in favor²⁶ than against²⁷ the petition and tariff.

The Commission does not specifically discuss matters that are not dispositive. The Commission makes each ruling on consideration of each party's allegations and arguments, and has considered the substantial and competent evidence on the whole record. Where the evidence conflicts, the Commission must determine which is most credible and may do so implicitly.²⁸ The Commission's findings reflect its determinations of credibility, and no law requires the Commission to make any statement as to which portions of the record the Commission believes or disbelieves.²⁹

Under that standard, the Commission makes the following findings of fact.

Findings of Fact

1. MAWC sells water and service for gain in Missouri.³⁰ MAWC's base level revenue, as set in MAWC's most recent general rate action,³¹ is \$258,926,618 and ten percent of that amount is \$25,892,662.³²

²³ *Heidebur v. Parker*, 505 S.W.2d 440, 443 (Mo. App., St.L.D. 1974).

²⁴ Section 393.150.1, RSMo 2000.

²⁵ *Spencer v. Zobrist*, 323 S.W.3d 391, 398 (Mo. App., W.D. 2010).

²⁶ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

²⁷ *Hager v. Director of Revenue*, 284 S.W.3d 192, 197 (Mo. App., S.D. 2009).

²⁸ *Stone v. Missouri Dept. of Health & Senior Services*, 350 S.W.3d 14, 26 (Mo. banc 2011).

²⁹ *Stith v. Lakin*, 129 S.W.3d 912, 919 (Mo. App., S.D. 2004).

³⁰ EFIS No. 1, (February 27, 2015) *Missouri-American Water Company's Petition to Change its*

2. MAWC's ISRS became effective on September 25, 2012.³³ The ISRS assumed more customer usage than occurred, so the ISRS generated less revenue than expected, so reconciliations determined under-recoveries. The Commission included those reconciliation amounts in ISRS revenues that the Commission authorized MAWC to recover.³⁴

3. As of the reconciliation period ending in September 2014, under-recoveries totaled \$1,665,202; and the Commission authorized MAWC's ISRS to produce \$25,637,873. But, due to declining sales, MAWC recovered only \$23,972,670 in ISRS revenues as of September 2014. That amount is \$1,919,991 short of \$25,892,662.³⁵

4. Between October 1 and March 31, 2015, MAWC incurred enough in eligible costs for an ISRS that produces more than \$25,892,662.

Conclusions of Law

The Commission has jurisdiction to rule on the petition and must determine the propriety of the tariff.³⁶ Generally, any tariff's propriety depends on whether it will support service that is "safe and adequate"³⁷ at rates that are "just and reasonable [.]"³⁸

Infrastructure System Replacement Surcharge and Tariff Revision, page 1 to 2, paragraph 1, incorporated into EFIS No. 28 (June 8, 2015) Exhibit 1, *Direct Testimony of Jeanne M. Tinsley on Behalf of [MAWC]*, page 3.

³¹ File No. WR-2011-0337, *In the Matter of Missouri-American Water Company's Request for Authority to Implement a General Rate Increase for Water and Sewer Service Provided in Missouri Service Areas*.

³² EFIS No. 28 (June 8, 2015) Exhibit 1, *Direct Testimony of Jeanne M. Tinsley on Behalf of [MAWC]*, page 3; EFIS No. 30 (June 8, 2015) Exhibit 3, *Direct Testimony of Mark L. Oligschlaeger*, page 4.

³³ EFIS No. 25 (June 5, 2015) *Transcript-Volume 1*, page 58.

³⁴ EFIS No. 28 (June 8, 2015) Exhibit 1, *Direct Testimony of Jeanne M. Tinsley on Behalf of [MAWC]*, page 7.

³⁵ EFIS No. 28 (June 8, 2015) Exhibit 1, *Direct Testimony of Jeanne M. Tinsley on Behalf of [MAWC]*, page 7.

³⁶ Sections 393.1003, RSMo Supp. 2014 and 393.150, RSMo 2000.

³⁷ Section 393.130.1, RSMo Supp. 2013.

That standard is subject to many considerations of law, fact, and policy in a general rate action but, in this action, the considerations are simplified.

Authorized, Produced, Recovered

The General Assembly has set forth the just and reasonable rates for safe and adequate service in the context of infrastructure system replacement. The ISRS statutes compensate infrastructure system replacement through a surcharge that produces revenue between a minimum and a maximum:

[A]n ISRS, on an annualized basis, must produce ISRS revenues of at least one million dollars but not in excess of ten percent of the water corporation's base revenue level approved by the commission in the water corporation's most recent general rate proceeding. [³⁹]

MAWC and Staff have shown without dispute that the maximum revenue is \$25,892,662, and that MAWC has invested enough in infrastructure system replacement to earn the maximum revenue. Therefore, MAWC and Staff agree that the maximum revenue is the target.

But, on the way to that target, MAWC and Staff part ways. MAWC asks for authorization to produce the difference between the maximum revenue and the revenue it has recovered so far.

Maximum Revenue - Revenue Produced to 09-14 = Tariff Revenue

$$\text{\$25,892,662} - \text{\$23,972,670} = \text{\$1,919,991}$$

That amount authorizes over-production of revenue, Staff notes.

Revenue Authorized to 09-14 + Tariff Revenue = MAWC's Total

$$\text{\$25,637,873} + \text{\$1,919,991} = \text{\$27,557,864}$$

³⁸ Section 393.130.1, RSMo Supp. 2013; and Section 393.150.2, RSMo 2000.

³⁹ Section 393.1003.1, RSMo Supp. 2013; 4 CSR 240-3.650.

\$27,557,864 > \$25,892,662

MAWC's Total > Maximum Revenue

Staff argues that the Commission must authorize revenue only to the maximum revenue. Staff also argues that the maximum revenue is the sum of the amount of revenue collected by MAWC through the ISRS as of September 2014, the amounts under-recovered from prior ISRS filings, and the new ISRS eligible costs:

Maximum Revenue - Revenue Authorized to 09-14 = Staff's Proposal

$\$25,892,662 - \$25,637,873 = \$254,789$

MAWC has consistently experienced declining sales that result in it recovering less than its Commission authorized ISRS revenues. However, Staff is correct that, if sales increase, MAWC will produce more; and if sales increase enough, the tariff will authorize MAWC to recover more than the maximum revenue.

The Commission is persuaded by MAWC's argument and calculation in this matter for the following reasons. The statutes provide that the ISRS must:

. . . allow for the adjustment of the water corporation's rates and charges to provide for the **recovery** of costs for eligible infrastructure system replacements. [⁴⁰]

The statute further provides:

If the commission finds that a petition complies with the requirements of sections 393.1000 to 393.1006, the commission shall enter an order authorizing the water corporation to impose an ISRS that is sufficient to **recover** appropriate pretax revenues, as determined by the commission pursuant to the provisions of sections 393.1000 to 393.1006. [⁴¹]

⁴⁰ Section 393.1003.1, RSMo Supp. 2013 (emphasis added).

⁴¹ Sections 393.1006(4), RSMo Supp. 2013.

MAWC also cites the Missouri Court of Appeals' opinion in In re Laclede Gas Co.⁴²

[T]he obvious legislative intent . . . is to permit the . . . company to timely **recover** its costs for government-mandated infrastructure system replacement projects via a rate adjustment outside of a general rate case for a limited period of time.^[43]

Staff's proposal does not meet that standard.

Revenue Recovered to 09-14 + Staff's Proposal = Staff's Total

$\$23,972,670 + \$254,789 = \$24,227,459$

$\$24,227,459 < \$25,892,662$

Staff's Total < Maximum Revenue

Staff's proposal includes reconciliation amounts, which according to the statute should not be included.

Staff offers a variety of aids to statutory construction, including presentations for professional associations and a fiscal note review, but there is no ambiguity in the provisions that guide this report and order. "Proper statutory construction starts with the words of the statute. In most cases, it ends there, as well."⁴⁴ Staff offers no persuasive authority to count the reconciliation amounts toward the maximum revenue, which is how the parties frame their dispute, as follows.

Authorized Surcharge v. Reconciliation Amounts

MAWC and Staff differentiate their arguments by their treatment of reconciliation amounts. Staff's proposal uses revenue authorized, of which the components include reconciliation amounts, so Staff's proposal "includes" reconciliation amounts. MAWC

⁴² In re Laclede Gas Co., 417 S.W.3d 815 (Mo. App., W.D. 2014).

⁴³ In re Laclede Gas Co., 417 S.W.3d 815, 823 (Mo. App., W.D. 2014) (emphasis added).

⁴⁴ In re M.D.R., 124 S.W.3d 469, 472 (Mo. banc 2004).

“excludes” reconciliation amounts because reconciliation amounts are—by definition—amounts not recovered, and the tariff uses the term “recovered.”

From this perspective, also, MAWC’s arguments are more persuasive because they stand on the plain language of the statutes. The statutes describe the two components of an ISRS—eligible costs and reconciliation amounts—separately. The statutes also prescribe differing treatments for each component during the ISRS cycle and at the ISRS cycle’s end.

The first component is the eligible costs. The statutes initially establish an ISRS based on eligible costs:

At the time that a water corporation files a petition with the commission seeking to establish or change an ISRS, it shall submit proposed ISRS rate schedules and its supporting documentation regarding the calculation of the proposed ISRS with the petition, and shall serve the office of the public counsel with a copy of its petition, its proposed rate schedules and its supporting documentation.^[45]

The statutes list eligible costs but do not include reconciliation amounts in that list:

“ISRS costs”, depreciation expenses and property taxes that will be due within twelve months of the ISRS filing [⁴⁶]

During the ISRS cycle, the statutes allow “changes” in that initially established ISRS:

A water corporation may effectuate a change in its rate pursuant to this section no more often than two times every twelve months.^[47]

At the end of the ISRS cycle, the statutes treat eligible costs as part of rates in the next general rate action:

⁴⁵ Section 393.1006.1(1), RSMo Supp. 2013.

⁴⁶ Section 393.1000(5), RSMo Supp. 2013.

⁴⁷ Section 393.1006.3, RSMo Supp. 2013.

An eligible water utility that has implemented an ISRS shall file revised ISRS rate schedules to reset the ISRS to zero when new base rates and charges become effective following a commission order establishing customer rates in a general rate proceeding that **incorporates eligible costs previously reflected in an ISRS into the subject utility's base rates.** [⁴⁸]

The eligible costs, initially established or changed, under that plain language do not include reconciliation amounts.

The second component is any reconciliation amount—positive or negative. The statutes define reconciliation amounts as:

. . . the **differences** between the revenues resulting from an ISRS and the appropriate pretax revenues as found by the commission for that period [⁴⁹]

During the ISRS cycle, the statutes provide for an under-recovery or subtract an over-recovery respectively by requiring MAWC to:

. . . submit the reconciliation and a proposed ISRS adjustment to the commission for approval to recover or refund the difference, as appropriate, through **adjustment** of an ISRS. [⁵⁰]

These differences show that reconciliation amounts are separate from, not a part of, the eligible costs of which recovery counts toward maximum revenue.

Moreover, the statutes' provisions for treatment during the ISRS cycle show the flaw in Staff's proposal:

. . . recover or refund the difference, as appropriate, through **adjustment** of an ISRS. [⁵¹]

⁴⁸ Section 393.1006.6(1), RSMo Supp. 2013 (emphasis added).

⁴⁹ Section 393.1006.5(2), RSMo Supp. 2013 (emphasis added).

⁵⁰ Section 393.1006.5(2), RSMo Supp. 2013 (emphasis added).

⁵¹ Section 393.1006.5(2), RSMo Supp. 2013 (emphasis added).

That language shows that the “appropriate . . . adjustment” for an under-recovery is for MAWC to “recover” the difference by increasing the ISRS in the next tariff. Staff’s proposal accomplishes the reverse by counting the under-recovery toward the maximum revenue, thus decreasing the ISRS in the next tariff. Decreasing the ISRS in the next tariff is the treatment provided by statute for an over-recovery to “refund” the difference to customers. As MAWC notes, Staff’s proposal compounds the under-recovery instead of applying the “appropriate” remedy that the General Assembly prescribed.

Staff also cites *In re Laclede Gas Co.*⁵² That opinion addresses only the time in which the Commission may establish an ISRS and the time in which the Commission may approve changes after that. *In re Laclede Gas Co.* does not address the components of an ISRS or the reconciliation process.

Therefore, the Commission will grant the petition and approve the tariff.

Over-Recovery and Deferred Recording

The Commission emphasizes that Staff’s concern with over-recovery is thoroughly justified because the risk of over-recovery under the ISRS statutes is real. The Commission’s conclusions in this case do not diminish that concern. This case highlights that, in certain circumstances, there is no mechanism built into the ISRS statutes that both allows MAWC a real opportunity to recover the maximum revenue the statute prescribes and also prevents MAWC from recovering more than the maximum revenue. The one mechanism to address over or under recovery in the ISRS rules

⁵² *In re Laclede Gas Co.*, 417 S.W.3d 815 (Mo. App., W.D. 2014).

applies only to recovery of amounts above or under the Commission-approved ISRS revenues, including ordered refunds.

. . . If an over or under recovery of ISRS revenues, including any commission ordered refunds, exists after the ISRS has been reset to zero, the amount of over or under recovery shall be tracked in an account and considered in the water utility's next ISRS filing that it submits pursuant to the provisions of section (2) of this rule.^{53]}

This does not explicitly cover a situation where it was necessary to authorize ISRS rates that could eventually recover more than the maximum revenue in order to be sure those rates can produce revenues up to the maximum amount.

Therefore, in order to effectuate the intent of the ISRS statutes and allow MAWC a real opportunity to recover the maximum revenue but not allow MAWC to recover more than the maximum revenue, the Commission will order that MAWC track its ISRS revenues.⁵⁴ No later than 60 days before MAWC expects to reach the maximum revenue allowed under the ISRS statutes, which is \$25,892,662 in this instance, MAWC must file a new tariff designed to discontinue any ISRS charges associated with the revenues the Commission is authorizing in this case

The Commission's determination renders MAWC's alternative request for relief moot. A matter is moot when it seeks a ruling that would have no practical effect on any

⁵³ 4 CSR 240-3.650(17)

⁵⁴ Section 393.140(8), RSMo 2000, authorizes the Commission to prescribe by order, after hearing, the accounts in which MAWC shall record particular outlays and receipts. No statute or regulation restricts, or sets any standard for, the Commission's exercise of that authority vis-à-vis the uniform system of accounts that the Commission has prescribed for all water companies under Section 393.140(8), RSMo 2000, at Regulation 4 CSR 240-2.030(1), which otherwise governs deferred recording. The facts as described constitute good cause to require MAWC to track ISRS revenue that MAWC recovers in excess of maximum revenue.

then-existing controversy.⁵⁵ MAWC's alternative request is to defer recording of any revenue denied, and no revenue is denied, so no deferred recording is possible. Therefore, the Commission will make no ruling on MAWC's request for deferred recording.

Effective Date

The Commission will set an effective date for this report and order less than 30 days after issuance.⁵⁶ Also, that effective date is part of the procedural schedule to which MAWC and Staff agreed, the Commission set, and no party objected to. Those facts show good cause for an effective date less than 30 days after issuance of this report and order.⁵⁷

THE COMMISSION ORDERS THAT:

1. The relief requested in *MAWC's Petition to Replace its Infrastructure Replacement Surcharge* is granted.

2. The tariff assigned tracking no. YW-2015-0267 is approved. The approved tariff sheet is:

P.S.C. MO NO. 13

6th Revised Sheet No. RT 10 Canceling 5th Revised Sheet No. RT 10

3. ISRS revenues resulting from this order shall be recorded as described in this report and order.

⁵⁵ *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001) (quoting *Shelton v. Farr*, 996 S.W.2d 541, 543 (Mo. App. W.D. 1999)).

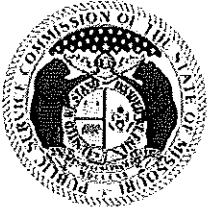
⁵⁶ *Harter v. Missouri Pub. Serv. Comm'n*, 361 S.W.3d 52, 58 (Mo. App., W.D. 2011).

⁵⁷ Section 386.490.3, RSMo Supp. 2013.

4. No later than 60 days before MAWC expects to reach the maximum revenue amount of \$25,892,662, MAWC must file a new tariff designed to discontinue all ISRS charges associated with the revenues resulting from this order.

5. This order shall be effective on June 27, 2015.

BY THE COMMISSION



A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur;
and certify compliance with
Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 17th day of June, 2015.

Appearances

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Daniel Jordan, Senior Regulatory Law Judge.